

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

BERTLING SERVICES,
Plaintiff,

VS.

MICHAEL D. BROWN and PHILIP
CHARLES BROWN,
Defendants.

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CIVIL ACTION NO.: SA-11-CA-00359-
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**DEFENDANTS' MOTION FOR LEAVE TO FILE AMENDED ANSWER,
AFFIRMATIVE DEFENSES AND COUNTER-CLAIMS**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COME MICHAEL D. BROWN and PHILIP CHARLES BROWN, Defendants in the above-styled and numbered cause, and file this Motion for Leave to File Amended Answer, Affirmative Defenses and Counter-Claims. In support of this Motion, Defendants show the Court the following:

1. This Court's Scheduling Order of July 19, 2011 states that the parties were to have filed all motions to amend or supplement pleadings by October 3, 2011.
2. Counsel for Defendants was substituted as attorney in charge for Defendants on August 4, 2011. To date, the most recent Answer asserted with this Court on behalf of Defendants is one which was filed before the 25th Judicial District Court in and for Guadalupe County, prior to the removal of this case to the United States District Court for the Western District of Texas. Defendants now seek leave to file their First Amended Answer, Affirmative Defenses and Counter-claims in order to conform to the formative

and substantive requirements of Rules 8, 12 and 13 of the Federal Rules of Civil Procedure.

3. In seeking leave to file their Amended Answer, Affirmative Defenses and Counter-claims, Defendants also seek to include an additional counter-claim for violations of the federal Employee Polygraph Protection Act, 29 U.S.C. § 2001, *et seq.* Specifically, Defendants and their counsel only recently met to discuss the status of this case, upcoming depositions and their pending claims for violation of the Fair Labor Standards Act (FLSA). During this meeting, Defendants informed their counsel for the first time that, during their employment with Plaintiff, they were advised that they would be fired if they did not submit to lie detector tests. When Defendants refused to submit to lie detector tests, they were, in fact, fired. Accordingly, given this flagrant violation of their federally protected rights, Defendants now seek leave to assert an additional counter-claim under the Employee Polygraph Protection Act. It should be noted that this additional counter-claim is not compulsory in nature, and was only recently revealed by Defendants to their counsel.

4. Prior to filing the present Motion for Leave, counsel for Defendants conferred with counsel for Plaintiff in order to determine whether Plaintiff would oppose the Motion for Leave. Counsel for Plaintiff indicated that Plaintiff is opposed to the present Motion for Leave. In response, counsel for Defendants relayed the fact that, if this Court is somehow not inclined to grant the present Motion for Leave, Defendants would have no choice but to file a separate federal Complaint asserting violations of the Employee Polygraph Protection Act. Regardless, in the interest of justice and the preservation of judicial economy, Defendants now seek leave to assert such claims in the form of a

counter-claim, given the fact that such allegations arise from the same set of facts, parties and circumstances leading up to the present dispute.

5. It should be noted that, notwithstanding Plaintiff's opposition to the filing of Defendants' Amended Answer, Affirmative Defenses and Counter-claims, Plaintiff would not be prejudiced or unfairly surprised in the least by the assertion of this new counter-claim. Specifically, no depositions in this case have yet taken place, and discovery does not close until February 10, 2012. Accordingly, Defendants now respectfully seek leave to file their Amended Answer, Affirmative Defenses and Counter-Claims, a copy of which is attached hereto as Exhibit "A" and incorporated by reference herein. Defendants' request is submitted not for purposes of delay, but so that justice may be done.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully request that the Court grant them leave to file their Amended Answer, Affirmative Defenses and Counter-Claims in response to Plaintiff's Amended Complaint and Answer to Defendants' Counter-Claims. Defendants further request such other and further relief, in law or equity, to which they may be justly entitled.

CERTIFICATE OF SERVICE

I hereby certify on the 14th day of December, 2011, this document was properly served on all counsel of record via electronic filing in accordance with the United States District Court, Western District of Texas Procedures for Electronic Filing.

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